PP

v.

FABIAN ANUAR MAIL

HIGH COURT SABAH & SARAWAK, TAWAU
ABDUL RAHMAN SEBLI JC
[CRIMINAL APPEAL NO: T42-12-2008]
10 AUGUST 2009

CRIMINAL LAW: *Anti-Corruption Act 1997 - Section 11(a) - Corrupt acceptance of gratification - Appeal by prosecution against respondent's acquittal and discharge - Prosecution's case - Essential ingredient of charges, whether proven - Whether respondent an "agent" of Government of Malaysia when alleged offences committed - Anti-Corruption Act 1997, ss. 2, 11(a), 42(1), 47(1)*

The respondent, the "Pengetua" of one Sekolah Menengah Kebangsaan Sepagaya ('SMK Sepagaya'), was charged in the Sessions Court with two charges of corruptly accepting gratification under s. 11(a) of the Anti-Corruption Act 1997 ('Act') which was punishable under s. 16 of the Act. He claimed trial to both charges, and was acquitted and discharged by the Sessions Court judge at the end of the prosecution's case without his defence being called. This was the Public Prosecutor's appeal against the order of acquittal and discharge. The relevant issue requiring consideration was whether the prosecution had proved an essential ingredient of the charges – that the respondent was an "agent" of the Government of Malaysia at the time of the alleged offences – beyond any reasonable doubt.

Held (dismissing the prosecution's appeal):

(1) Although the prosecution had established through the evidence of its witnesses that the respondent was the "Pengetua" of SMK Sepagaya at the material times stated in the charges, this was not proof that the respondent was an "agent" within the meaning of s. 2 of the Act. To establish that the respondent was an "agent" within the meaning of s. 2 of the Act, the prosecution must prove that the respondent had been properly appointed as an officer of the Government and was acting in his capacity as the "Pengetua" of SMK Sepagaya when he allegedly committed the offences. The testimonies of the prosecution's witnesses did not provide such proof. (para 11)

(2) The prosecution could have easily proved that the respondent was an "agent" of the Government. The evidence could have come from the relevant officer of the Education Department and by producing the respondent's service record. It was hard to comprehend why the respondent's service record was not produced in this case. Another simpler way of proving that the respondent was an "agent" was by producing the certificate under s. 47(1) of the Act, which would have provided *prima facie* proof that the respondent was a public servant and, therefore, an agent of the Government. But even this simple step was not taken. (paras 13 & 14)

(3) The prosecution's argument was obviously based on the assumption that since the respondent was the "Pengetua" of SMK Sepagaya he must have been properly appointed as such. The flaw in this argument was that it placed assumption on the same level as proof. Section 42(1) of the Act presumes corrupt motive once gratification has been proved to have been received but before that provision can be invoked against the respondent, the onus lay on the prosecution to prove that he was in fact employed by the Government. As the prosecution had failed to prove this element, the presumption had no application. The Sessions Court judge was hence right in acquitting and discharging the respondent without calling for his defence. (paras 16, 17, 18 & 19)

Case(s) referred to:
PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***

Legislation referred to:
Anti Corruption Act 1997, ss. 2, 10, 42(1), 47(1)

For the prosecution - Joyce Blasius DPP; AG's Chambers
For the respondent - Ram Singh; M/s Ram Singh Harbans & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Rahman Sebli JC:

[1] The respondent was charged in the Sessions Court at Tawau with offences specified in the following charges:

[2] First Charge

Bahawa kamu pada 25.9.2001 di Bank Bumiputra Commerce cawangan Tawau, di Daerah Tawau, di dalam Negeri Sabah, sebagai seorang ejen Kerajaan Malaysia, iaitu, Pengetua Sekolah Menengah Kebangsaan Sepagaya, Lahad Datu, Sabah telah secara rasuah menerima untuk kamu sendiri satu suapan, iaitu wang tunai sebanyak RM2,000 daripada Hj. Gulam bin Hj. Saluan iaitu pembekal makanan bermasak untuk asrama SMK Sepagaya, Lahad Datu, sebagai suatu dorongan bagi melakukan suatu perbuatan berhubung dengan urusan hal ehwal principal kamu, iaitu, mengesahkan dan meluluskan penambahan jumlah pelajar-pelajar asrama, untuk membolehkan pembekal tersebut membuat tuntutan lebihan keatas murid-murid asrama sekolah kamu, dan demikian kamu telah melakukan satu kesalahan di bawah seksyen 11(a) Akta Pencegahan Rasuah 1997 yang mana boleh dihukum di bawah seksyen 16 Akta yang sama.

[3] Second Charge

Bahawa kamu pada 6.4.2002 di Sekolah Menengah Kebangsaan Sepagaya, di Daerah Lahad Datu, di dalam Negeri Sabah, sebagai seorang ejen Kerajaan Malaysia, iaitu, Pengetua Sekolah Menengah Kebangsaan Sepagaya, Lahad Datu, Sabah telah secara rasuah menerima untuk kamu sendiri satu suapan, iaitu cek MBB no. 772659 sebanyak RM4,000 daripada Hj. Gulam bin Hj Saluan iaitu pembekal makanan bermasak asrama SMK Sepagaya, Lahad Datu, sebagai suatu dorongan bagi melakukan suatu perbuatan berhubung dengan urusan hal ehwal principal kamu, iaitu, mengesahkan dan meluluskan penambahan jumlah pelajar-pelajar asrama, untuk membolehkan pembekal membuat tuntutan lebihan keatas murid-murid asrama sekolah kamu, dan demikian kamu telah melakukan satu kesalahan di bawah seksyen 11(a) Akta Pencegahan Rasuah 1997 yang mana boleh dihukum di bawah seksyen 16 Akta yang sama.

[4] He claimed trial to both charges and was acquitted and discharged by the learned Sessions Court Judge at the end of the prosecution case without calling for his defence. The Public Prosecutor now appeals against the order of acquittal and discharge.

[5] One of the essential ingredients of the charges which the prosecution must prove beyond any reasonable doubt is that the respondent was an "agent" of the Government of Malaysia. This requires proof that the respondent was a Government officer at the time of the alleged offences.

[6] "Agent" is defined by s. 2 of the Anti Corruption Act 1997 ("the Act") to mean:

> any person employed by or acting for another, and includes an officer of a public body or an officer serving in or under any public body, a trustee, an administrator or executor of the estate of a deceased person, a sub-contractor, and any person employed by or acting for such trustee, administrator or executor, or sub-contractor.

[7] "Officer of a public body" means:

> any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a Judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds and, where the public body is a corporation sole, includes the person who is incorporated as such.

[8] "Public body" is not exhaustively defined but includes the following:

(a) the Government of Malaysia;

(b) the Government of a State;

(c) any local authority or any other statutory authority;

(d) any department, service or undertaking of the Government of Malaysia, the Government of a State, or a local authority;

(e) any company over which any public body as is referred to in paragraph (a), (b), (c) or (d) has controlling power; or

(f) any society, union, organization or body as the Minister may prescribe from time to time by order published in the Gazette.

[9] Is there evidence that the respondent was an "agent" of the Government at the time of the alleged offences? The prosecution relied on the testimonies of the following five witnesses, three of them businessmen to prove this element:

Wong Teck Wai (PW3)

He is a businessman who in 2001 and 2002 was the supplier of building materials to SMK Sepagaya. He said he knows the "Pengetua" of the school and that he is the respondent.

Suriyani bte Sipon (PW5)

She is the supervisor of Asrama SMK Sepagaya from August 2000 until November 2001. She identified the respondent as the "Pengetua" of SMK Sepagaya.

Vincent Chen Shu Hwa (PW6)

He is the owner of Syarikat Supreme Teknik Enterprise and had contract works at SMK Sepagaya in 2001. He confirmed that the respondent is the "Pengetua" of the school.

Ho Bee Seng (PW8)

He is a teacher at SMK Sepagaya and also confirmed that the respondent is the "Pengetua" of the school.

Gulam bin Saluan (PW9)

He is a businessman and supplied food to Asrama SMK Sepagaya from 1998 to 2003. He identified the respondent as the "Pengetua" of SMK Sepagaya since 2004.

[10] Two other teachers, namely Mazuin binti Maihaddin (PW1) and Nurbayah binti Alimuddin (PW2) were also called to prove that the respondent was the "Pengetua" of SMK Sepagaya but it is obvious they had not even been posted to the school at the time of the alleged offences. Their evidence on this point is therefore irrelevant.

[11] What the prosecution has established through the evidence of PW3, PW5, PW6, PW8 and PW9 is that the respondent was the "Pengetua" of SMK Sepagaya at the material times. Is this proof that the respondent was an "agent" within the meaning of s. 2 of the Act? I do not think so. To establish that the respondent was an "agent" within the meaning of s. 2 of the Act the prosecution must prove that the respondent had been properly appointed as an officer of the Government and was acting in his capacity as the "Pengetua" of SMK Sepagaya when he allegedly committed the offences. The testimonies of PW3, PW5, PW6, PW8 and PW9 do not provide such proof.

[12] It is only when a person has been properly appointed that he can lawfully exercise the powers that come with the appointment. A familiar example will illustrate the point. A man passes of as "Pengetua" of SMK Sepagaya and everybody swears

A that he is the "Pengetua". Does that make him the lawful "Pengetua" of SMK Sepagaya? Certainly not. If he corruptly receives or accepts a gratification while masquerading as the "Pengetua" he does so as an impersonator, not as an agent of the Government. He can be charged for impersonation and possibly
B an offence under s. 10 of the Act but not for accepting gratification as agent of the Government.

[13] It would have been easy for the prosecution to prove that the respondent was an "agent" of the Government. The evidence
C could come from the relevant officer of the education department and by producing the service record of the respondent. Surely the education department keeps service records of all its officers including the respondent. Why the service record of the respondent was not produced in this case is hard to comprehend.
D Could it be that the record if produced would be unfavourable to the prosecution?

[14] There is another and simpler way of proving that the respondent was an "agent" and that is by producing the certificate issued under s. 47(1) of the Act. If produced the certificate would
E have provided "*prima facie* proof" that the respondent was a public servant and therefore an agent of the Government. But even this simple step was not taken.

[15] The learned Deputy Public Prosecutor submitted that since
F the evidence of PW3, PW5, PW6, PW8 and PW9 and the documentary evidence (which states the respondent's position as "Pengetua, SMK Sepagaya") were not challenged at all in cross examination they are deemed to be admitted. The learned Deputy Public Prosecutor is right of course but where, as here, the
G unchallenged evidence falls short of proving an element of the offence the failure to challenge is of no avail to the prosecution.

[16] It is trite to say that in criminal proceedings where the burden on the prosecution is to prove every element of the
H offence beyond any reasonable doubt nothing must be left to assumption. Assumption, perception, suspicion and the like cannot be substitutes for proof. In this case the prosecution's argument is obviously based on the assumption that since the respondent was the "Pengetua" of SMK Sepagaya he must have been
I properly appointed as such. The flaw in this argument is that it places assumption on the same level as proof.

[17] Failure to prove that the respondent was an "agent" of the Government means that the prosecution failed to establish an essential ingredient of the charges. It is axiomatic that the prosecution must prove each and every element of the offence charged. A *prima facie* case is not established if any one of the essential elements of the offence is not established at the close of the prosecution case.

[18] Section 42(1) of the Act presumes corrupt motive once gratification has been proved to have been received but before that provision can be invoked against the respondent the onus lies on the prosecution to prove that he was in fact employed by the Government: see *PP v. Yuvaraj* [1969] 2 MLJ 89. As the prosecution failed to prove this element the presumption has no application.

[19] The learned Sessions Court Judge was therefore right in acquitting and discharging the respondent without calling for his defence.

[20] For reasons stated above the prosecution's appeal is without merit and is accordingly dismissed.